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Sent Via Fax and Courier

Permits Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, Room 13705
Silver Spring, MD20910

Subject: **Proposed Rule- Public Display**
Docket No.: 001031304-0304-01; ID 080299B (RIN 0648-AH261

Dear Sir/Madam:

The following institutions submit their response to NMFS proposed rule governing public display of marine mammals:

Marine Mammal Coalition
Gulfarium, Ft. Walton, Florida
Marine Life Oceanarium, Gulfport, Mississippi
Marine Animal Productions, Gulfport, Mississippi
Institute for Marine Mammal Studies, Gulfport, Mississippi

We are very concerned about the proposed regulations and their impact on the public display community. These regulations are not only contrary to the intent of the 1994 amendments but, if approved, will stifle the ability of zoos and aquariums to carry out their functions mandated by Congress.

Many facilities are suffering from NMFS regulations impeding the acquisition of animals, which has caused several smaller facilities to go out of business while others have had to curtail their use of marine mammals in their exhibits. Still others have been discouraged to develop new facilities or enhance existing ones due to lack of animals.

The unintended consequence (direct and indirect) of NMFS burdensome regulations for "Transport/Transfer" and restrictions on U.S. facilities for "take" from U.S. waters has resulted in the unregulated trade in marine mammals in Cuba, Russia, Mexico, China, Indonesia, and Japan.

Despite strong and consistent Congressional support for public display, the Proposed Rule imposes additional and unnecessary burdens on the public display of marine mammals. The Proposed Rule should be withdrawn, rewritten, and republished for comment

We fully support the comments of the Alliance of Marine Mammal Parks and Aquariums and American Zoo and Aquarium Association and submit the following additional comments for your consideration.

OVERVIEW

The Marine Mammal Protection Act ("MMPA" or "Act") was passed in 1972 largely as a result of public concern about the mortalities of marine mammals caused by activities such as sealing, whaling and commercial fishing. At the same time, Congress recognized the invaluable role served by the public display of marine mammals. Marine mammal public display facilities are visited by millions of people annually and are essential to carrying out the purposes and policies of the Act. The public display of marine mammals stimulates public interest in, educates about, and creates support for, marine mammal conservation. Congress also recognized the important role of public display institutions as ''resources of great international significance, esthetic and recreational as well as economic." 16 U.S.C. § 1361(6). In fact, Congress has given public display a special status under the Act, making it an exception to the general moratorium on takings. 16 U.S.C. § 1371(a)(1).

These considerations are reflected in the Congressional deliberations on the Act. For example, Senator Hollings stressed that without observing marine mammals in oceanaria the "magnificent interest''in marine mammals will be lost and "none will ever see them and none will care about them and they will be extinct." Ocean Mammal Protection: Hearings Before the Subcommittee on Oceans and Atmosphere of the Senate Committee on Commerce, 92nd Cong., 2d Sess., 266 (1972). "If it were not for these organizations and the public exposure you have on these animals in the first place, these matters wouldn't be brought to the attention of the public." Id. at 555.

During the consideration of the 1988 amendments to the Act, Congress reaffirmed the importance of public display and scientific research, strongly endorsing continued issuance of permits for these purposes. The House Committee report stressed:

> [E]ducation is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, recreational and economic significance, as well as an important part of the marine ecosystem. It is important, therefore,

that public display permits be issued to entities that help inform the public about marine mammals, as well as perform other functions.

H. Rept. No. 970, 100th Cong., 2d Sess., 33-34 (1988).

Similarly, the Senate Committee Report stated:

[E]ffective public display of marine mammals provides an opportunity to inform the public about the great aesthetic, recreational, and economic significance of marine mammals and their role in the marine ecosystem.

S. Rept. No. 592, 100th Cong., 2d Sess., 29 (1988). The Senate Report also stated:

The Secretary's determination should be guided by the fact that it is not the intent of this legislation to prohibit the display of marine mammals in zoos, aquaria, or amusement parks that comply with applicable regulations and standards. The Committee recognizes that the recreational experience is an important component of public display and that public display has served a useful educational purpose, exposing tens of millions of people to marine mammals and thereby contributing to the awareness and commitment of the general public to protection of marine mammals and their environment.

In 1994, when Congress again considered amendments to the Act ("1994 Amendments") affecting the public display of marine mammals, Congress reaffirmed the importance of public display. The Report of the Senate Committee on Commerce, Science, and Transportation accompanying the legislation, which became the 1994 Amendments to the Act stated:

Dolphins, sea lions, and other marine mammals are popular displays at public zoos and aquariums across the United States. The MMPA recognizes that this display provides an important educational opportunity to inform the public about the esthetic, recreational, and economic significance of marine mammals and their role in the ocean ecosystem.

S. Rept. No. 220, 103rd Cong., 2d Sess., 4 (1994).

The public display provisions, which became the text of the 1994 Amendments, were developed through a negotiated process and virtually identical texts were added to the underlying House and Senate bills. The Senate text was added via a floor amendment offered by Senator Exon. In support of the amendment, Senator Exon stated:

In 1992 alone, over 108 million people visited American zoos and aquariums. In fact, I can think of no better form of family entertainment and education. Research has shown that wildlife

> public display programs are not only educational, they enhance public commitment to conservation . . . .
>
> America's public display institutions are playing an absolutely critical role in the conservation of marine mammals and endangered species. They have taken their responsibilities to the public, their animals and future generations very seriously. Self-regulation among America's zoos, aquariums, and marine parks significantly exceeds minimum federal and state standards.

140 Cong. Rec., S.3302 (daily ed. March 21, 1994). Senator Lott echoed Senator Exon's sentiments stating:

> Public display and scientific research institutions in Mississippi and throughout the United States play an essential role in marine mammal conservation. Over 100 million people annually visit such institutions and learn about the conservation of these magnificent creatures . . . . This amendment . . . reaffirms the role of public display in increasing public awareness and understanding about marine mammals. Id. at S.3300.

SPECIFIC COMMENTS ON THE REGULATIONS PROPOSED BY THE NATIONAL MARINE FISHERIES SERVICE TO IMPLEMENT THE MARINE MAMMAL PROTECTION ACT

The 1994 Amendments to the Act were a reaction to, and rejection of, regulations proposed by the National Marine Fisheries Service ("NMFS"). In 1993, NMFS proposed replacing 5 pages of public display regulations with a 234-page "simplification." The 1994 Amendments rejected that "simplification."

On July 3, 2001, more than seven years after passage of the 1994 Amendments, NMFS published proposed regulations ("Proposed Regulations") to implement the 1994 Amendments. 66 Fed. Reg. 35209 (July 3, 2001). The Proposed Regulations are inconsistent with, and contradict, the 1994 Amendments, resurrecting many of the same sweeping and costly proposals Congress rejected in 1994. The following are the principal issues.

I. Care and Maintenance Standards for Marine Mammals

Before the 1994 Amendments, NMFS claimed it had equal authority with the Animal and Plant Health Inspection Service ("APHIS") to establish and enforce care and maintenance standards for marine mammals at public display facilities. The 1993 proposed regulations made clear that NMFS intended to exercise its claimed authority in significant ways. However, in the 1994 Amendments, Congress decided it was wasteful for two agencies to have identical responsibilities and that the public display community

should not be subjected to double jeopardy by having two different agencies enforcing care and maintenance standards. Therefore, Congress determined that APHIS would have sole authority over the care and maintenance of animals at public display facilities. Nevertheless, the Proposed Regulations resurrect the rejected 1993 approach by giving NMFS joint responsibility to enforce APHIS' care and maintenance standards.

Reflecting Congressional intent to have only one agency issuing and enforcing care and maintenance standards, the 1994 Amendments provided that when NMFS issues a public display permit, NMFS' responsibility is restricted to determining whether the public display facility "is registered or holds a license" issued by APHIS pursuant to the Animal Welfare Act ("AWA"). 16 U.S.C. § 1374(c)(2)(A)(ii). Indeed, the preamble to the Proposed Regulations admits that the "Captive care and maintenance of marine mammals held for public display are now under the sole jurisdiction'' of APHIS. 66 Fed. Reg. at 35211. The preamble also admits that the 1994 Amendments had the specific effect of "removing the jurisdiction of NMFS over public display captive animal care . . . ." Id. Thus, Congress clearly provided that the establishment and enforcement of marine mammal care and maintenance standards is APHIS' responsibility.

Nevertheless, the Proposed Regulations attempt to overturn the 1994 Amendments by stating that NMFS' authority is not limited to determining if a public display facility has an APHIS registration or license. Instead, the Proposed Regulations state NMFS must also independently determine that the facility complies with all of APHIS' care and maintenance standards. Proposed § 216.43(b)(3)(ii), 66 Fed. Reg. at 35216. As in 1993, NMFS is claiming it has joint responsibility with APHIS to enforce APHIS' care and maintenance standards.

This intent becomes very clear in § 216.43(a)(4) of the Proposed Regulations which states that public display facilities must allow any National Oceanic and Atmospheric Administration ("NOAA") employee to examine any marine mammal, to inspect all public display facilities and operations, and to review and copy all records concerning any marine mammal. 66 Fed. Reg. at 35216. Compounding the problem of having two agencies enforcing the same regulations, the Proposed Regulations state that "any person" designated by NMFS will also have the right to examine any marine mammal held for public display, to inspect any public display facility, and to review and copy all records. [Emphasis added.] Proposed § 216.43(a)(4), 66 Fed. Reg. at 35216.

Simply put, the Proposed Regulations could create the situation in which APHIS finds a facility in compliance with APHIS' standards, but NMFS, or some private person designated by NMFS, says that APHIS is wrong about APHIS' own regulations --- and NMFS can then either deny the facility the right to display animals or seize the animals.

This was the specific result Congress rejected in 1994. Not only do the Proposed Regulations create budgetary questions regarding why Congress would want two agencies enforcing the same statute, particularly when the AWA vests sole enforcement authority with APHIS, but they also raise public policy and significant privacy issues regarding why any member of the public designated by NMFS should have the right to

inspect facilities for compliance with APHIS standards and to require public display facilities to turn over all of their records.

II. Export of Marine Mammals

Although Congress and the courts have rejected NMFS' effort to apply the MMPA in foreign nations, the Proposed Regulations specifically attempt to make foreign citizens subject to NMFS' regulations. Not surprisingly, foreign nations are not enthusiastic about subordinating their sovereign authority to NMFS' regulations.

Prior to the 1994 Amendments, NMFS required that marine mammals could be exported for public display only if the foreign nation agreed it would afford comity to any decision by NMFS to modify, suspend or revoke that permit. 66 Fed. Reg. at 35213. The 1994 Amendments rejected the NMFS requirement. The 1994 Amendments provided that any person properly holding marine mammals for public display in the United States could export the animals "without obtaining any additional permit or authorization.'' 16 U.S.C. § 1374(c)(2)(B). However, the 1994 Amendments did effectively address the export issue by stating that a marine mammal could be exported for public display only if the receiving facility met "standards that are comparable to the requirements that a person must meet to receive a permit'' under the MMPA for public display. 16 U.S.C. § 1374(c)(9). There are three such standards: the facility must (1) offer a program for education or conservation based on professionally recognized standards of the public display community; (2) have an APHIS registration or license[1]; and (3) be open to the public on a regularly scheduled basis with access not limited except by an admission fee. 16 U.S.C. §1374(c)(2)(A). Significantly, Congress applied this comparability test only to the facility that receives the animals from the United States, and not to subsequent transfers between foreign facilities.

In the 1994 Amendments, Congress clearly recognized the continuing validity of the decision in United States v. Mitchell, 553 F.2d 996, 1003, 1005 (5th Cir. 1977), where the Court held the MMPA does not apply within the territory of a foreign sovereign. Indeed, a December 10, 1996 opinion from the Office of General Counsel, NOAA, stated the MMPA "does not confer U.S. jurisdiction over marine mammals in the territory of other sovereign states."

Nevertheless, and even after the 1994 Amendments rejected NMFS' approach, NMFS continued to insist on letters of comity as a condition of export. The understandable reluctance of sovereign nations to agree that NMFS' regulations will become the law of their land has resulted in anger toward the U.S. and has caused U.S. public display facilities to incur enormous transactional costs to find some way to satisfy NMFS and the foreign government.

The Proposed Regulations make a bad situation worse. The Proposed Regulations amend the statute by replacing the comparability test with the requirement that the

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[1] This standard is met through a comparability review by **APHIS.**

foreign facility "must meet the public display criteria at Sec. 216.43(b)(3)(i) through (iii). . . ." [Emphasis added.] Proposed § 215.43(f)(2), 66 Fed. Reg. 35219. However, the requirements of section 216.43(b)(3)(i)-(iii) include not only the three statutory requirements that a facility offer an education or conservation program based on professionally recognized standards, be registered or hold on APHIS license, and be open to the public, but section 216.43(b)(3)(ii) adds NMFS' newly minted requirement that NMFS independently determine that the facility complies with APHIS' care and maintenance standards.2

But the Proposed Regulations do not stop here. NMFS interprets the MMPA provision requiring NMFS to maintain an inventory of marine mammals held under MMPA permits, 16 U.S.C. § 1374(c)(10), to mean that NMFS must maintain an inventory of those animals and their progeny even if the animals are no longer in the U.S. 66 Fed. Reg. 35213. Since everyone agrees the MMPA does not apply outside the U.S., it is hard to see how NMFS reaches the conclusion that NMFS is to apply the inventory reporting requirements to foreign citizens. Nevertheless, NMFS combines that interpretation with its new version of the comparability standard to conclude that NMFS can prohibit the export of a marine mammal until the government of the country in which the receiving facility is located signs a letter of comity agreeing "to enforce requirements equivalent to the U.S. Marine Mammal Protection Act. . . ." Proposed § 216.43(f)(4), 66 Fed. Reg. 35219, see 66 Fed. Reg. 35213. The regulatory preamble makes it quite clear that equivalency means all of NMFS' regulatory requirements. 66 Fed. Reg. at 35212-13. Thus, the preamble states that NMFS' regulatory requirements apply "to all holders of animals exported from the United States . . . ." Id.

To understand the problem, a case example may be helpful. The Proposed Regulations, including the letter of comity, have the effect of providing that if an animal is exported from the United States to a French facility in 2001, and the French facility decides in 2011 to transfer the animal to a public display facility in Spain, then the French government and the French facility must determine that the Spanish facility meets the MMPA standards as interpreted by NMFS, including the requirement that the facility meets APHIS requirements and has an acceptable education or conservation program --- and NMFS must receive a transport notification and inventory report from both the Spanish and French facilities. If the animal at the Spanish facility gives birth 5 years later, the Spanish facility must file an inventory report with NMFS reporting the birth. If that progeny is transferred to a public display facility in Germany 10 years later, the Spanish government and the Spanish facility are to ensure that the German facility meets the requirements of the U.S. MMPA as interpreted by NMFS, including the requirement that the facility meets APHIS standards and has an acceptable education or conservation program --- and NMFS is to receive a transport notification and inventory report from both the Spanish and the German facilities. If 15 years later, now 40 years after the original 2001 export from the U.S., the marine mammal originally transferred, now in a Spanish facility dies, NMFS is to receive an inventory notice of that event together with

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2 After requiring absolute compliance, the Proposed Regulations state that the receiving facility must also submit to NMFS a letter from **APHIS** certifying that the receiving facility meets standards comparable to those of APHIS. Proposed § 216.43(f)(2), 66 Fed. Reg. at 35219.

an explanation of the cause of death. And if the progeny, now in Germany, dies in 2061, 60 years after the parent left the United States, NMFS is to receive an inventory notification including the cause of death.

These "comity" requirements are nothing more than an effort by NMFS to apply the MMPA internationally, something neither Congress nor the courts allow. The Proposed Regulations not only raise very serious international relations issues, but they also raise serious questions about whether NMFS should be using its limited resources to transform itself into an international regulatory agency.

111. The Removal of Animals from the Wild

Although no public display facility has taken marine mammals from the wild since 1992, it may be necessary to do so to maintain genetic diversity and breeding. The Proposed Regulations make that impossible. This is contrary to the intent of Congress, which has consistently given preferential treatment to public display facilities and their ability to acquire animals.

With respect to non-depleted species, the Proposed Regulations provide that unless NMFS has established a removal quota, the applicant for a take permit must demonstrate that the taking "will not have, by itself or in combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect" on the species. Proposed § 216.43(b)(3)(v)(B), 66 Fed. Reg. at 35216. However, existing regulations already require a permit applicant to demonstrate that any taking "by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock. . . ." 50 C.F.R. 216.34(a)(4).

The Proposed Regulations significantly change the existing standard and create an impossible burden to meet. Unlike the existing regulations which require a showing that the taking is not "likely" to have a significant adverse effect on the species, the Proposed Regulations require that the public display community prove a negative *i.e.*, that the taking "will not have" a significant adverse effect. Moreover, the Proposed Regulations now require that public display facilities prove a negative not only with respect to "direct" effects but also with respect to what NMFS calls "indirect" effects.

Not only do the Proposed Regulations establish standards which are virtually impossible to meet, but if a person tries to meet the standard, NMFS creates still more obstacles because the Proposed Regulations allow NMFS to require public display facilities to undertake extensive, expensive and time consuming research to gather and analyze population level information and to evaluate every other direct or indirect take or source of mortality. The Proposed Regulations are quite specific that NMFS' decision on whether to allow the taking is to be based on the best available information "including information gathered by the applicant." This last clause allows NMFS to require an unending gathering of new information in order to satisfy whatever information thresholds NMFS may establish.

The public display community does not object to the existing requirement that it demonstrate that any removal from the wild is not likely to adversely affect the population at issue. The community does object to the wording in the Proposed Regulations moving the goalposts and permitting NMFS to insist on information gathering, which allows NMFS to move the goalposts again by requiring new studies before NMFS can make a decision.

A clear example of NMFS' moving the goalposts is found with respect to depleted species. The MMPA prohibits the taking of any depleted species. 16 U.S.C. § 1372(b)(3). The Proposed Regulations, include the statutory prohibition but then go on to amend the MMPA by also prohibiting the taking of animals from a species, which is "proposed by NMFS to be designated as depleted. . . ." Proposed § 216.43(b)(4)(iii)(A), 66 Fed. Reg. at 35216. Even the Endangered Species Act does not have a provision like that which NMFS is trying to insert into the MMPA. Significantly, NMFS does not impose upon itself any time limit for reaching a final decision on its proposal to designate a species as depleted.

Finally, the agency requires foreign organizations to follow the same regulations that apply to collections in the U.S. However, it often rejects or challenges the studies provided by the scientists or governments of foreign countries. The net result is that NMFS can arbitrarily prevent acquisition of animals from both international and U.S. waters. We recommend that quotas be established specifically for "take" by public display so that these facilities can plan their activities in an orderly manner without bureaucratic obstacles.

IV. Transfer, Reporting and Other Requirements

The 1994 Amendments provide that a person issued a permit to take or import marine mammals for public display shall have the right "without obtaining any additional permit or authorization" to sell, transport, transfer, etc. the marine mammal to persons who meet the MMPA requirements. 16 U.S.C. § 1374(c)(2)(B). The MMPA also provides that a person exercising these permit rights must notify the Secretary of Commerce no later than 15 days before any sale, transport, etc. 16 U.S.C. § 1374(c)(2)(E). However, the Proposed Regulations ignore the simple and direct process contained in the statute and resurrect elements of the 1993 proposed "simplification" that Congress rejected.

Not only do the Proposed Regulations require that the shipping facility provide the statutorily required 15-day transport notice, but the shipping facility must also submit a complete Marine Mammal Data Sheet ("MMDS") for each mammal to be transferred. Proposed § 216.43(e)(1)(i), 66 Fed. Reg. 35217. The MMDS gives the animal's official NMFS identification number, name, sex, age, origin, etc. --- information already held in the NMFS inventory. The Proposed Regulations go on to state that in addition to receiving a transport notification and MMDS from the shipping facility, NMFS must also receive a transport notification and another MMDS for the marine mammal from the receiving facility. Id. After the transfer occurs, the receiving facility must confirm the

transport and submit yet another MMDS. Proposed § 216.43(e)(2), 66 Fed. Reg. at 35218. Thus, a single 15-day notification required by the statute has been transformed into the submission of three transport notifications for the same transaction and three MMDS forms restating the information already in the inventory.3

Moreover, the Proposed Regulations require that before a transport can occur, both the holder and the receiver must provide NMFS with a certification that the receiver meets the requirements of § 216.43(b)(3)(i)-(iii) of the Proposed Regulations. Proposed § 216.43(e)(1)(i), 66 Fed. Reg. at 35217-18. As noted above, these provisions include requirements that a facility have a conservation or education program, have an APHIS license or registration, be open to the public and be in compliance with all APHIS requirements. However, the Proposed Regulations make persons subject to civil or criminal penalties for submitting false information. Proposed § 216.13(g), 66 Fed. Reg. at 35215.

Read together, these provisions mean that a shipping facility is now subject to penalties if NMFS finds, for example, that the receiving facility is not in full compliance with APHIS standards. It is not clear why an APHIS determination of compliance with APHIS requirements is not adequate and why the shipper and receiver must provide an independent certification, particularly when the MMPA says the transfer may occur without further permit or authorization.

The Act's requirement for a 15 day notification has been replaced in the Proposed Rule by six forms, three of which repeat the identical information already contained in the inventory, and two of which contain certifications nowhere required by the Act.

Similarly, there is no statutory foundation for the requirement in Proposed § 216.43(e)(1)(iii) that NMFS receive notification 15 days in advance of the transport of a marine mammal for a school visit or similar outreach event in which.

Proposed §§ 216.43(e)(1) and (2) should be deleted and replaced by a simple letter notification when possession of an animal is being transferred. Confirmation of the transfer will be made upon submission of an updated annual inventory report. Moreover, the word "conditional" should be deleted from the introductory clause of Proposed § 216.43(e), which states that the right to transfer or transport marine mammals is a "conditional" right. The Act states explicitly that a permit granted under the Act "shall grant" to the permit holder "the right, without obtaining additional permit or authorization" to engage in certain activities including the transfer of possession. This right is not "conditional."

The changes to Proposed §§ 216.43(e)(1) and (2) will necessitate parallel changes in the structure of Proposed §§ 216.43(d) and (e)(3). Furthermore, Proposed § 216.43(d) should be amended by deleting the reference to "physical location" everywhere it is

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3 Many observers have questioned the need for the inventory since there is no apparent use of the inventory by NMFS. Given that, the question becomes whether the inventory requirements should be deleted from the Act.

found. Inclusion of the term "physical location" could mean that the transfer of an animal to a different "physical location" requires a 15-day notice because the term "physical location" is specifically juxtaposed with the term " facility" which implies a distinction between the two. Thus, if the term "physical location" is accorded its ordinary dictionary meaning, it could be interpreted to mean that if a marine mammal is moved 50 feet from one pool to another there is a change in the "physical location'' requiring a 15-day notice. Since the purpose of the transport notification provisions of the Act is to advise NMFS of changes of ownership, it is not clear why a change in physical location, which does not involve a change of ownership, requires any notification, let alone the multiplicity of forms set forth in the Proposed Regulations. As set forth in the last sentence of 16 U.S.C. § 1374(c)(2)(E), the Secretary may only require that the 15 day notification include information required for the inventory. References to "physical location" in this part of the Proposed Rule should be deleted. A corresponding change should also be made in the definition of "transport" in Proposed § 216.43(a)(v). Similarly, the transport of an animal for a school visit or outreach event does not involve a change of inventory status and, therefore, does not trigger the 15 day notification required by Proposed § 216.43(e).

A necessary corollary is that no 15-day notice is required when an animal is moved but remains in the care and custody of the same person. The 15-day notice is intended to apply to the situation in which possession of a marine mammal is transferred to another person. The Proposed Rule defines this as a change in custody. Proposed § 216.43(a)(i), where the animal is under the same person's care and control, and is held under the same APHIS registration and license, there is no transfer requiring a 15-day notice. Indeed, as noted above, the Act states that in a transport notification, NMFS may "only" require information required for the inventory. 16 U.S.C. § 1374(c)(2)(E). In the fact pattern described in this paragraph, there is no change in the inventory and, therefore, no 15-day notice is required. The Proposed Rule should be amended to make this clear.

Finally, after erecting the regulatory regime described above, the Proposed Regulations state that any public display permit issued by NMFS shall "contain other conditions deemed appropriate'' by NMFS, a catchall provision apparently authorizing NMFS to issue any additional requirements it might think appropriate. Proposed § 216.43(b)(5), 66 Fed. Reg. 35216. Although such a provision might seem a reasonable contingency for most agencies, given NMFS' history, it is a provision about which significant questions must be raised because, in the past, NMFS has not exercised its authority judiciously.

In sum, NMFS has taken the simple process provided for in the statute and converted it into a needlessly cumbersome process.

V. Other Issues

Although the preceding are the major issues, there are a number of other issues in the Proposed Regulations that are of concern. For example, Congress intended that the marine mammal inventory be a record of animals actually held at public display facilities.

There are serious questions about whether the inventory serves any regulatory purpose. That said, if the inventory is to be a record of marine mammals held at public display facilities, its only valid purpose could be with respect to living marine mammals. It is neither appropriate nor necessary that the Proposed Regulations require facilities to'report stillbirths since such animals will not become part of the inventory of animals at public display facilities. See Proposed § 216.43(e)(4)(vii), 66 Fed. Reg. at 35218. The issue regarding stillbirths is with respect to genetics and public display facilities already report stillbirths to these persons who maintain these genetic records.

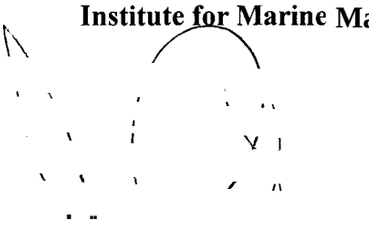
CONCLUSION

The Proposed Rule should be withdrawn, rewritten and re-proposed. Many of its provisions have already been specifically reviewed and rejected by Congress. Clearly, these provisions of the Proposed Rule should be deleted. Other parts of the Proposed Rule constitute direct amendments to the MMPA. It is Congress, not NMFS, which has the constitutional authority to amend the law. Such provisions of the Proposed Rule should also be deleted. Still other sections of the Proposed Rule are contrary to the Act. They too should be deleted. We urge the Agency to meet with members of the public display community to discuss their concerns and mitigate the issues prior to putting forth the extensive effort and resources in promulgating a new Rule.

Again, thank you for allowing us to comment on this very important issue.

Sincerely;

Marine Mammal Coalition
Gulfarium
Marine Life Oceanarium
Marine Animal Productions
Institute for Marine Mammal Studies



Moby A. Solangi, Ph.D.